Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
City Signal Communications, Inc.	)	
	)	
Petitioner	)	
v.	)	
	)	
Defendants:	)	
City of Cleveland Heights	)	CS Docket No. 00-253
	)	
City of Wickliffe	)	CS Docket No. 00-254
	)	
City of Pepper Pike	)	CS Docket No. 00-255
	)	

Reply Comments of
Metromedia Fiber Network Services, Inc.

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February 14, 2001

SUMMARY

Metromedia Fiber Network Services, Inc. ("MFNS") submits its reply comments on the Petitions for Declaratory Ruling filed by City Signal Communications, Inc. ("City Signal"). City Signal asks the Federal Communications Commission ("Commission") to preempt any pronouncement, rule, regulation, or ordinance by the Ohio cities of Pepper Pike, Cleveland Heights, and Wickliffe (collectively "Defendant Cities") that prohibits, or may have the effect of prohibiting, the ability of City Signal from providing interstate or intrastate telecommunications service. City Signal also requests the Commission to order that permits be issued to City Signal to construct fiber optic aerial facilities in the Defendant Cities. The Commission issued a Public Notice on December 22, 2000 seeking comments on City Signal's petitions. Comments were filed on January 30, 2001.

Not surprisingly, the filed comments were evenly divided: carriers agree that the Commission must take action to solve City Signal's problem; state and local governments ("Municipalities") suggest that the Defendant Cities are not violating the Telecommunications Act of 1996 ("Act")[1] and that the petitions should be denied.

MFNS continues to urge the Commission to grant City Signal's petitions to the fullest extent possible and to send a message to Municipalities that they must comply with the Act. MFNS and Aldelphia provided the Commission with a significant number of examples of Municipal abuse in rights-of-way management in addition to the Defendant Cities. The problem is widespread and will not be tamed until the Commission takes definitive action to clarify the scope of Municipal authority contemplated by the Act.

[1] 47 U.S.C.§ 151, *et. seq.*

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I. INTRODUCTION

MFNS is a leader in providing dedicated fiber optic infrastructure and high-bandwidth advanced services for communications intensive customers throughout the United States and in several European cities. MFNS is one of the leaders in this country's transition from a legacy copper telecommunications infrastructure to a fiber infrastructure. However, the longer MFNS and other carriers are delayed by Municipal intransigence, the longer this transition will take. Consequently, MFNS urges the Commission to take the opportunity provided by the City Signal petitions to clearly articulate the rights granted by the Act for carriers to occupy the public rights-of-way in all Municipalities on fair and non-

discriminatory terms and to further elaborate on how this obligation applies on an issue-specific basis.

MFNS cannot stress enough the risk that City Signal, MFNS and other carriers have taken in bringing these issues to the Commission's attention. MFNS noted its fear of Municipal retribution in its opening comments. Thus far, MFNS has been threatened with a lawsuit for defamation by one former city official. MFNS has also received at least two phone calls from other Municipalities displeased with how they were characterized in MFNS' opening comments.

Among other things, some Municipalities claim that MFNS' own delays have led to the extensive delays MFNS has experienced. As a general rule, this is simply not the case. In the majority of situations, MFNS may have delayed in responding to a Municipality's offer of rights-of-way access. However, this response was primarily because the terms required by the Municipality for such access were so onerous and inconsistent with the Act's requirements that MFNS needed to regroup and consult its lawyers before responding to such demands. Nevertheless, when MFNS responded, the Municipalities continued to insist on the same illegal terms. Hopefully, the Commission can appreciate MFNS' delays in that context.

Additionally, it is significant for the Commission to note that MFNS attempted to serve copies of its comments on every Municipality named in its opening comments. In summary, MFNS is willing to make these issues public and withstand legitimate scrutiny.

The comments provided below first respond to two of the Defendant Cities' claims that City Signal has no need to attach to existing utility poles because MFNS has made conduit available to them. The comments then address specific contractual requirements

that MFNS would like the Commission to address, either in the context of the this proceeding, or, if necessary, a separate proceeding. Finally, the comments address claims made by the city of Center Line, Michigan that the city's delays were in fact caused by MFNS' own delays and claims by Federal Way, Washington urging the Commission to disregard MFNS' comments in this proceeding.

II. THE COMMISSION SHOULD FIND THAT MUNICIPALITIES MAY NOT DICTATE HOW A CARRIER CONSTRUCTS ITS NETWORK AND MAY NOT FORCE OTHER CARRIERS TO CONSTRUCT FOR THEIR COMPETITORS

The comments filed by Cleveland Heights and Pepper Pike state that MFNS has resolved the issue before the Commission by making conduit available to City Signal, thus eliminating City Signal's need for aerial facilities. This is not exactly accurate.

Although MFNS agreed to lease conduit to City Signal in Cleveland Heights and agreed to consider it in Pepper Pike, it did so begrudgingly. Further, notwithstanding the availability of MFNS conduit, City Signal should be permitted to install its facilities aerially if that is its preference, until there is a *nondiscriminatory* ban on aerial attachments and *all aerial attachments are moved underground.*[2]

A. Pepper Pike

Pepper Pike's opening comments state that MFNS is in discussions to provide duct to City Signal within the city so that City Signal does not need to place its facilities above-ground. MFNS' initial plans included a route through Pepper Pike. Consequently, in

[2] By "grandfathering" the ILEC aerial facilities and requiring all new entrants to go underground, cities clearly violate the provisionsof section 253 that require competitive neutrality. In their comments Pepper Pike and Cleveland Heights justify the difference in policies because the ILEC facilities have been in place for 15-20 years. This fact is simply immaterial. City Signal should have the same competitive advantage as the ILEC to quickly install facilities above-ground. This is the essence of the non-discrimination provisions of the Act.

reviewing MFNS' initial plans the city asked MFNS to make conduit available to City Signal. MFNS agreed to consider Pepper Pike's request. However, it is important for the Commission to note that, like most carriers, MFNS does not generally construct facilities to lease to its competitors and it should not be required to do so as a condition of right-of-way access. In a competitive market, time to market is key; helping the competition get to the market at the same time that you do is not part of the equation. Requirements of this type take time and money away from the core business of telecommunications.

Significantly, since agreeing to consider to make conduit available to City Signal, MFNS has changed its plans and is no longer going through Pepper Pike. Consequently, City Signal's petition is even more prescient because it has lost the underground option presented by MFNS.

City Signal should not be further delayed until Pepper Pike can force another carrier to install extra facilities underground for City Signal. As a fundamental matter, the Commission should declare that City Signal has the same rights as the ILEC, to place its facilities above or below ground – depending upon its needs as determined by City Signal, and not the city.

B. Cleveland Heights

Cleveland Heights correctly states in its opening comments that MFNS had agreed to provide conduit to City Signal, permitting underground installation of its facilities. In fact, Cleveland Heights was so determined to have MFNS construct City Signal's network that it negotiated with MFNS on City Signal's behalf. Among other things, Cleveland Heights asked MFNS to *reroute its network* to accommodate City Signal's desired route.

In addition, the City asked MFNS to install additional duct that the city could make available to new carriers.

In order to obtain access to Cleveland Height's right-of-way, MFNS agreed to install conduit and manholes for both City Signal and the city. The city required that MFNS install four ducts for the city's own use to lease to future, unknown carriers interested in the same route. Cleveland Heights has agreed to reimburse MFNS for the *incremental cost* of installing the additional conduit and manholes, but payment will not be made until other carriers lease the facilities. Consequently, MFNS is forced to expend a significant amount of money in advance so that its competitors will have access to the City's rights of way. It is not unlikely that the City will seek to generate revenue for itself from this deal. This is especially troubling because the city is not an equal joint trench partner, paying its way in the construction project. The city insists on incremental cost payments that would not be available to any of MFNS' competitors constructing at the same time as MFNS.

In summary, Cleveland Heights has turned MFNS into a contractor for City Signal. MFNS must meet City Signal's manhole installation specifications, which differ from MFNS', and the City has even requested that MFNS' construction be completed by August 1 to meet City Signal's own construction schedule.

C. What Could the Defendant Cities Have Done?

MFNS understands and appreciates the Defendant Cities' desire to have all future utility facilities placed underground. However, as set forth above, MFNS is not in the business of constructing its competitor's networks. The requirements imposed by Pepper Pike and Cleveland Heights on both MFNS and City Signal far exceed the scope of rights-

of-way management contemplated by the Act, particularly since City Signal's first preference was to install facilities on *existing* utility poles currently occupied by the ILEC. Rather than delaying MFNS' own construction in these cities, proper rights-of-way management would have allowed City Signal to place its facilities on the poles, provided City Signal agreed to underground its route when the ILEC goes underground. This proposal is a win/win for everyone, and complies with the law: 1) the Defendant Cities reserve the right to require future undergrounding of existing facilities; 2) the ILEC and City Signal receive similar treatment; and 3) when undergrounding eventually occurs, it is accommodated through a joint trench with all of the carriers currently on the pole sharing their apportioned costs and following an established route. Third party plans are not delayed in the process.

Because the Defendant Cities discriminated against City Signal, imposed unreasonable requirements on it, and unduly delayed addressing the issue, the Commission should grant City Signal's petitions and make it clear that actions such as those practiced by the Defendant Cities exceed Municipal authority under section 253 and will not be tolerated.

III. THE COMMENTS OF ADELPHIA AND MFNS DEMONSTRATE THE NEED FOR CLEAR DIRECTION FROM THE COMMISSION ON LAWFUL RIGHT-OF-WAY MANAGEMENT

Like MFNS, Adelphia Business Solutions, Inc. ("Adelphia") provided examples to the Commission of Municipal abuse based on its experiences throughout the country. The breadth of MFNS' and Adelphia's comments on Municipal abuse is testimony to the severity of the problem faced by companies who are actually constructing new fiber optic networks throughout the country.

MFNS respectfully repeats its suggestion that, to the extent issues raised by MFNS (or Adelphia) are outside the scope of these proceedings, or the record requires further development, the Commission should quickly initiate a rulemaking proceeding to establish nationwide right-of-way access standards and rights that cannot be contracted away without a full reservation of rights. The following discussion suggests some of the issues that the Commission could address in such a proceeding, to the extent not resolved in this proceeding.

As demonstrated in MFNS' opening comments, Municipalities routinely require carriers to agree to unreasonable contractual terms that are beyond the scope of rights of way management. In essence, the carrier is required to contract away its rights under state or federal law in exchange for rights-of-way access under the terms dictated by a Municipality. Examples of contractual requirements that the Commission should determine are against public policy and, consequently, cannot be required include:

An Obligation To Remove Telecommunications Facilities When The Rights-Of-Way Agreement Terminates. This obligation is contained in almost every franchise or rights-of-way agreement reviewed by MFNS. However, it clearly runs afoul of the Act's prohibition in Section 253(a) that states and local governments shall not do anything that prohibits a carrier from providing telecommunications services. Additionally, Municipalities routinely complain about the impacts of carrier excavation on their rights-of-way. However, if enforced, a carrier would create much more damage removing its facilities from the rights-of-way that it did installing them. Quite simply, there is no legitimate rights-of-way management concern in including this provision in a franchise or rights-of-way agreement.

Waiver Of All Rights. Municipalities routinely require carriers to expressly waive all their rights under federal and state law to challenge a franchise or rights of way agreement. Alternatively, they refuse to grant carriers a full reservation of rights. Provisions of this type prevent carriers from resolving the misdeeds of specific Municipalities before the Commission or a court. Quite simply, carriers anxious to get into the ground to provide services will sign almost anything and try to compete on an uneven playing field, rather than enforce the rights granted by the Act. A finding that such provisions are unenforceable as a matter of public policy would permit carriers to bring more specific instances of abuse to the proper authorities so that the vision of telecommunications competition sought by the Act can be fulfilled.

In Kind Contributions And Construction For Other Carriers. As mentioned in MFNS' opening comments, MFNS has invested millions of dollars in conduit and fiber facilities at the demand of Municipalities for their use. Often, such requirements are not imposed on the ILEC. The Commission should consider whether these requirements are proper under the Act, and develop mechanisms for carriers to avoid the imposition of such requirements. Additionally, the Commission should find that it is inappropriate to require carriers to be "construction" companies for either a Municipality or another carrier, as was required in the Cleveland Heights situation described above. As MFNS acknowledged in its opening comments, joint trenching when carriers are planning on going down the same route may be appropriate. However, the requirements imposed on MFNS in the City Signal situation are far beyond what "reasonable" rights of way management practices would require.

Customer Lists. Municipalities routinely demand that carriers agree to provide customer lists for their review. Setting aside the obvious points that such information is highly proprietary and Municipalities have no established mechanisms for keeping such information confidential especially given the Freedom of Information Acts in each state, this requirement serves no legitimate rights-of-way management purpose. MFNS is the carrier responsible to the Municipalities for the placement of the facilities in the rights of way. MFNS' customers have no relationship with the Municipalities. Further, MFNS includes a clause in its customer contracts requiring them to comply with all federal, state, and local requirements, including franchising. Municipalities who claim this isn't enough state that they want to know "who is using their rights of way." However, they would not dream of requiring the ILEC to produce similar lists. Consistent with the decisions in *Classic Telephone* and *AT&T v. Dallas*, the Commission should declare that such information is not relevant to rights of way management and need not be disclosed, regardless of Municipal demands. See *In re Classic Telephone,* 11 F.C.C.R. 13082 and *AT&T v. City of Dallas,* 8 F.Supp. 2d 582, 593 (N.D. Tex. 1998).

Insurance, Indemnification and Bonding. Municipalities often require very high insurances limits, bonds, and other security devices. In some instances, they require that a bond or other security of sufficient value to pay for a full restoration of the rights-of-way in the event facilities must be removed. Such security must be posted for the life of the facilities in the rights-of-way. Some Municipalities also require carriers to indemnify them for the Municipality's own gross negligence, and intentional or

criminal acts. Clearly, such requirements are an abuse of power and should be addressed by the Commission.

Unfortunately, as in its opening comments, MFNS could provide even more examples of the issues that the Commission should address. In summary, it is critical to telecommunications competition that the Commission take the issues raised herein seriously and that it plan to address them in a timely manner. Most important, the Commission should make clear that the Enforcement Bureau's "rocket docket" process is available for right-of-way disputes to quickly resolve improper demands by Municipalities.

IV. FURTHER COMMENT ON CENTER LINE, MICHIGAN

On January 31, 2001 a representative for the city of Center Line, Michigan contacted MFNS, objecting to MFNS' characterization of Center Line's delays. MFNS had reported in its opening comments that Center Line had delayed issuance of MFNS' permit to access the public rights-of-way by more than 4 months beyond the state law 90-day statutory deadline. Center Line complained that many of the delays had actually been caused by MFNS. While MFNS appreciates that there are often two very different sides to the same story, that is simply not the case in the Center Line situation.

MFN filed its Michigan Telecommunications Act ("MTA") Right-of-Way Permit Application with Center Line on March 30, 2000. The permit application alerted the City to the statutory 90-day period to process such an application which had been the law since 1995. On April 30, 2000, MFNS sent Center Line a reminder that MFN had filed its Application 30 days prior and had not heard from the City. On June 2, 2000, the City responded by forwarding a Construction Permit Application to MFN. In subsequent telephone conversations and correspondence, MFN explained its request was for a statutory

MTA permit, not a construction permit, and on June 23, 2000, MFN forwarded to the City a draft Telecommunications Right-of-Way Permit. Shortly thereafter, a representative for the city contacted MFNS.

Surprisingly, the city's representative was unaware that Center Line had ever considered any type of right-of-way approvals previously with other telecommunications service provider. As late as August 15, 2000, more than three months after it's filing, the city's representative admitted that he had never actually seen MFNS' MTA Permit Application.

On July 14, 2000, apparently in an attempt to try to circumvent the 90-day statutory period to act on a permit request under Section 251 of the MTA, the city's representative notified MFNS that the city could not consider MFNS as having applied for a permit under the MTA until MFNS submitted a "proposed permit." Such a position was nonsensical. The MTA requires filing of an "application for a permit", not a draft permit. However, the city continued to ignore its statutory duty to act on MFNS' MTA permit request within the 90 day statutory period. The city's representative also stated that the 90 day statutory period was immaterial because MFNS had not finalized any MTA permits with other municipalities in the area. Again, such a position is ridiculous. MFNS notified the city no fewer than 7 times that failing to issue the requested MTA permit within the 90 day statutory period was a violation of the MTA.

Over a three or four week period, several drafts of proposed MTA permits flowed between the City and MFNS. However, the city's positions on most items were unacceptable to MFNS because they violated the Michigan Telecommunications Act. By mid-August, discussions with the city's representative had produced no results and the city

continued to insist on passing a telecommunications regulatory ordinance prior to taking up MFNS' MTA Permit Application. However, the telecommunications ordinance proposed by the city violated the MTA in so many respects, and was so overreaching and unreasonable, that MFNS could not accept a permit issued under it. For example, Section 67-13 of the proposed Telecommunications Ordinance, regarding changes in ownership in control of a telecommunication permittee, was so broad that it required the city's consent before MFNS could sell bonds on Wall Street, issue additional shares of stock, or name a new chairman or president. Because the proposed ordinance, running over 30 pages in length, was so unlawful and unreasonable, MFNS refused to accept any permit governed by it.

As late as early August, the city was still attempting to force MFNS into signing a permit "agreement" which could have contractually bound MFNS to numerous unreasonable and unlawful requirements and substantially inflated the City's regulatory authority.

On August 21, 2000, the City finally passed its voluminous and unlawful Telecommunications Ordinance. As a result of further discussions with the City, even after the approval of MFNS permit by the City Council, MFNS did not receive a final permit for its execution until October 10, 2000, and MFNS has still not received a city-executed copy of the MTA Permit.

Clearly, the delays caused by MFNS were the result of MFNS' refusal to acquiesce to the city's unreasonable demands.

V. Response to Federal Way's Allegations

MFNS is deeply troubled by the reply comments filed today by the city of Federal Way, Washington. MFNS' opening comments did not suggest that the Federal Way franchise was in any way inappropriate, as suggested by the city's reply comments. Rather, MFNS' opening comments took umbrage with the city's burdensome repaving requirements. As the city's reply comments point out, the franchise itself requires MFNS to "install new asphalt overlay for a *minimum* distance of 300 feet from the cut or trench on both sides of the cut or trench (i.e., a total distance of 600 feet)..." Section 8 (emphasis added). The franchise does not *limit* the city's ability to require *more* overlay; it simply sets a minimum. City staff has clearly stated in several meetings with MFNS that they intended to require MFNS to pave 500 feet of road on either side of a new manhole. In fact, MFNS opted to locate all of its manholes outside the street in response to this requirement. The author of the city's comments is, in fact, the person who has failed to check his facts, as a quick discussion with the city's Public Works staff will demonstrate.

MFNS stands by the assertion in its comments and respectfully requests that the Commission disregard the city's suggestion that all of MFNS' opening comments are somehow flawed and should be disregarded. If anything, the city's reply comments demonstrate the accuracy of MFNS' opening comments. Federal Way's attempt to discredit MFNS by mischaracterizing MFNS' opening comments as an attack on its franchise requirements and a repudiation of its proposed franchise agreement, rather than a legitimate example of an overly burdensome repaving regulation, is exemplary Municipal behavior - the kind that prompted MFNS to file its opening comments.

VI. CONCLUSION

MFNS appreciates the opportunity the Commission has provided it to comment on issues related to obtaining access to public rights-of-way. It is sad to note that while there have been several celebrations of the fifth anniversary of the Act, many carriers struggle daily just to obtain reasonable and non-discriminatory access to public rights-of-way – something guaranteed by the Act but often ignored by Municipalities. This issue is worthy of the Commission's continued attention and affirmative action. The goals of the Act will not be fully realized until all bottlenecks are eliminated, and access to public rights-of-way is one of the most persistent and unfortunate bottlenecks that carriers experience today.

Respectfully submitted,

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Dated: February 14, 2001

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply Comments of Metromedia Fiber Network Services, Inc. were filed electronically at the FCC on this 14th day of February, 2001 and on the 15th day of February, 2001 were sent to the of the following:

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